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8 NOT FOR CITATION

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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12 ANTHONY CRAVER,) No. C 02-04629 JF (PR)
13 Petitioner,) ORDER DENYING PETITION FOR
14 vs.) WRIT OF HABEAS CORPUS AND
15 ERNIE ROE, Warden,) DENYING CERTIFICATE OF
16 Respondent.) APPEALABILITY

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18 Petitioner, a state prisoner, filed a pro se habeas petition pursuant to 28 U.S.C.
19 § 2254, challenging his state conviction. Concluding that the petition stated cognizable
20 claims, the Court ordered Respondent to show cause why the petition should not be
21 granted. Respondent filed an answer addressing the merits of the petition, and Petitioner
22 filed a traverse. After reviewing the papers and the relevant portions of the record, the
23 Court concludes Petitioner is not entitled to habeas corpus relief based on the claims
24 presented. Accordingly, the petition will be denied.

25
26 **BACKGROUND**

27 The following is a summary of relevant facts from the opinion of the California
28 Court of Appeal affirming judgments against Petitioner and a co-defendant following a

1 joint trial. People v. Deshon, et. al, A087395, slip op. at 2-3, 5-6, 7-9 (June 19, 2001)
 2 (Ans., Exh. 7 (“Op.”) at 9-10.):

3 In the late evening of May 22 or early morning of May 23, 1998, Petitioner and
 4 two of his friends, Deshon and Tyrrell, both of whom later were Petitioner’s co-
 5 defendants, went to the home of Joey Cutrufelli. All three agreed at trial that they were
 6 going to Cutrufelli’s home so that Petitioner could pick up something – Petitioner and
 7 Tyrrell testified that it was drugs, while Deshon testified that it was a pool stick. Cutrufelli
 8 lived with his mother and female cousin, who also were at home at that time. Each
 9 Defendant testified to not knowing of any weapons being brought into the house,
 10 although Deshon and Tyrrell testified that Petitioner brought a black bag, the contents of
 11 which were unknown to them. After Defendants’ arrival at Cutrufelli’s home, Petitioner
 12 and Cutrufelli spoke about drugs and money, and their conversation escalated into an
 13 argument. The testimony at trial was inconsistent as to what happened and where each of
 14 the three Defendants was during the argument. The argument escalated into violence, and
 15 Cutrufelli was shot and killed. Cutrufelli’s cousin testified at trial that Craver and Deshon
 16 each had a gun. The three Defendants fled the scene, and Cutrufelli’s mother and cousin
 17 called 911.

18 The Defendants each were apprehended within several days of the incident, and
 19 criminal proceedings ensued as follows:

20 [Petitioner], Deshon and Tyrrell were charged with murder,
 21 burglary, attempted robbery, and false imprisonment. All were
 22 charged with two special circumstances in connection with the
 23 murder: committing the murder while engaged in the commission
 24 of a burglary and committing the murder while engaged in the
 25 commission of an attempted robbery (Pen. Code, § 190.7, sub.
 26 (a)(17)).

27 The information also alleged numerous firearm use
 28 enhancements. Among other things, [Petitioner] was charged with
 personally using a firearm during the commission of the murder
 within the meaning of Penal Code section 12022.53, subdivision
 (b). That provision applies to a defendant who personally used a
 firearm whether or not the firearm was operable or loaded.
 Deshon was charged with personally using a firearm during the
 commission of the murder within the meaning of Penal Code
 section 12022.53, subdivision (d). That provision applies to a
 defendant who intentionally and personally discharged a firearm

1 and proximately caused death to any person other than an
 2 accomplice.

3 The joint jury trial began on March 29, 1999. The jury
 4 began deliberations on April 29 and returned a verdict on May 5.
 5 Deshon and [Petitioner] were found guilty of murder, attempted
 6 robbery and false imprisonment. The jury found true the special
 7 circumstance that Deshon and [Petitioner] committed the murder
 8 while engaged in the commission of an attempted robbery and
 9 also found true the related firearm use and arming allegations.
 10 Thus, the jury accepted the prosecutor's theory that Deshon
 11 actually shot Cutrufelli. The jury could not agree on a verdict
 12 with respect to Tyrrell.

13 Deshon was sentenced to life in prison without parole for the
 14 murder, a consecutive term of 25 years to life for the personal
 15 firearm use enhancement, and another consecutive term of 6 years
 16 and 8 months for other convictions and enhancements.
 17 [Petitioner] was sentenced to life in prison without parole for the
 18 murder conviction, and a consecutive determinate term of 17 years
 19 and 8 months for the other convictions and enhancements.

20 (Op. at 9-10.)

21 DISCUSSION

22 I. Standard of Review

23 This Court will entertain a petition for a writ of habeas corpus "in behalf of a
 24 person in custody pursuant to the judgment of a state court only on the ground that he is in
 25 custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.
 26 § 2254(a). The Court may not grant a petition with respect to any claim that was
 27 adjudicated on the merits in state court unless the state court's adjudication of the claim:
 28 "(1) resulted in a decision that was contrary to, or involved an unreasonable application of,
 clearly established Federal law, as determined by the Supreme Court of the United States;
 or (2) resulted in a decision that was based on an unreasonable determination of the facts
 in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d).

29 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the
 30 state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a
 31 question of law or if the state court decides a case differently than [the] Court has on a set
 32 of materially indistinguishable facts." Williams (Terry) v. Taylor, 529 U.S. 362, 412-13
 33 (2000). "Under § 2254(d)(1)'s 'reasonable application clause,' a federal habeas court may
 34 not issue the writ simply because the court concludes in its independent judgment that the

1 relevant state-court decision applied clearly established federal law erroneously or
 2 incorrectly. Rather, that application must also be unreasonable.” Id. at 411.

3 A federal habeas court making the “unreasonable application” inquiry should ask
 4 whether the state court’s application of clearly established federal law was “objectively
 5 unreasonable.” Id. at 409. The “objectively unreasonable” standard does not equate to
 6 “clear error” because “[t]hese two standards . . . are not the same. The gloss of clear error
 7 fails to give proper deference to state courts by conflating error (even clear error) with
 8 unreasonableness.” Lockyer v. Andrade, 123 S. Ct. 1166, 1175 (2003).

9 Under U.S.C. § 2254(d)(2), a federal court may grant the habeas writ if it concludes
 10 that the state court’s adjudication of the claim “resulted in a decision that was based on an
 11 unreasonable determination of the facts in light of the evidence presented in the State court
 12 proceeding.” 28 U.S.C. §2254(d)(2). The Court must presume correct any determination
 13 of a factual issue made by a state court unless the petitioner rebuts the presumption of
 14 correctness by clear and convincing evidence. 28 U.S.C § 2254(e)(1).

15 II. Legal Claims and Analysis

16 As grounds for federal habeas relief, Petitioner asserts the following claims: (1) the
 17 trial court’s ruling permitting co-defendant Deshon to testify in a narrative statement
 18 violated Petitioner’s rights to due process and to be present at critical stages of his trial; (2)
 19 the trial court’s jury instructions violated Petitioner’s rights to due process and to a jury
 20 trial on all elements of the offense; (3) the trial court’s admission of Petitioner’s
 21 involuntary statement violated Petitioner’s rights against self-incrimination and to due
 22 process; (4) there was insufficient evidence to support the jury’s finding of a felony
 23 murder special circumstance; and (5) the trial court’s admission of the 911 tape violated
 24 Petitioner’s right to due process.

25 A. Trial court’s decision to allow Petitioner’s co-defendant to testify in
 26 narrative form

27 Petitioner’s first claim is that the trial court’s ruling permitting Deshon to testify in
 28 a narrative statement violated Petitioner’s rights to due process and to be present at critical

1 stages of his trial. (Pet. at 1.) During trial, the judge asked if Deshon would testify. (Op.
 2 at 29.) Deshon’s attorney requested an *in camera* hearing in order to resolve a dispute that
 3 counsel characterized as being ““like a Marsden¹ motion.”” (Id.) The judge conducted the
 4 hearing with Deshon, his attorney, and the court reporter. (Id.) Afterwards, the judge
 5 explained in court that ““Mr. Deshon is taking the stand. Choosing to do that, he will be
 6 testifying in a narrative fashion. The court will not allow any objection to that style of
 7 presentation. It is subject to full cross, normal cross-examination.”” (Id.)

8 The trial judge discussed the procedures for Deshon’s testimony with all defense
 9 counsel present, and responded to counsels’ concerns by “admonish[ing] Deshon to
 10 confine his testimony to personal knowledge and to speak slowly and to stop speaking if
 11 objections were made.” (Id.) The trial judge also allowed Deshon’s testimony to be tape
 12 recorded, and agreed to allow a recess after Deshon’s testimony so that all defense counsel
 13 could review the tape before cross-examining Deshon. (Id.) After Deshon’s direct
 14 testimony, including the “relatively short and straightforward narrative testimony,” “the
 15 prosecutor and attorneys for the other defendants each conducted comparatively lengthy
 16 cross-examinations” without requesting a recess. (Id. at 30.)

17 1. Due process

18 Petitioner argues that Deshon only could have been permitted to testify in a
 19 narrative fashion because Deshon’s attorney knew that his client was going to commit
 20 perjury.² (Pet. at 2.) He contends that for the trial court and Deshon’s attorney

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22 ¹A Marsden motion is a motion made by a criminal defendant who wishes to
 23 discharge his or her attorney. See People v. Marsden, 2 Cal.3d 118 (1970). The
 24 defendant must show that the attorney’s representation is inadequate or that the defendant
 25 and attorney are “embroiled in such an irreconcilable conflict that ineffective
 representation is likely to result.” People v. Barnett, 17 Cal.4th 1044, 1085 (1998)
 (internal citations omitted).

26 ² Both Petitioner and the California Court of Appeal refer to People v. Johnson, 62
 27 Cal.App. 4th 608 (1998), which held that where a defendant wishes to testify and an
 28 attorney believes that the defendant’s testimony may constitute perjury, using “the
 narrative approach” to testimony would allow a defendant to exercise his or her right to

1 “knowingly [to] allow[] Deshon to testify falsely about Petitioner’s role in the charged
 2 crimes . . . violated [P]etitioner’s rights to due process and a fundamentally fair trial.” (*Id.*
 3 at 4.)

4 The state appellate court found this argument unpersuasive and rejected the claim,
 5 explaining that whether Deshon’s narrative testimony was true was not for the trial judge
 6 or Deshon’s attorney to decide, but for the jury. (Op. at 33.) The case was one in which
 7 “[t]hree defendants and two witnesses gave different and often conflicting testimony about
 8 the very same events.” (*Id.*) The state appellate court noted that the fact that Deshon’s
 9 attorney may not have believed a portion of Deshon’s testimony did not necessarily render
 10 the testimony untrue. (*Id.*)

11 “[A] conviction obtained by the knowing use of perjured testimony is
 12 fundamentally unfair, and must be set aside if there is any reasonable likelihood that the
 13 false testimony could have affected the judgment of the jury.” United States v. Agurs, 427
 14 U.S. 97, 103 (1976). In fact, a conviction based in part on perjured testimony or false
 15 evidence, even perjured testimony or false evidence presented in good faith, does not
 16 comport with fundamental fairness. See Hayes v. Brown, 399 F.3d 972, 980 (9th Cir.
 17 2005) (prosecutor’s action in presenting false evidence to the jury and by failing to correct
 18 the record (that no agreement had been reached to favorably dispose of pending felony
 19 cases of main witness) violated petitioner’s rights, even where testifying witness did not
 20 commit perjury because he had not been informed of prosecutor’s agreement with his
 21 defense counsel); Killian v. Poole, 282 F.3d 1204, 1209 (9th Cir. 2002) (key prosecution
 22 witness’ perjury about deal in exchange for his testimony deprived defendant of right to
 23 trial by jury).

24 Ultimately, relief will depend on whether with the perjured testimony or false
 25 evidence Petitioner received a fair trial. See Kyles v. Whitley, 514 U.S. 419, 434 (1995)

26
 27 rtestify while keeping the attorney from violating his or her ethical obligations from
 28 aiding a client in committing perjury. (Pet. at 3, Op. at 30.)

1 (using test in context of suppression of evidence); Hall v. Director of Corrections, 343
 2 F.3d 976, 984 (9th Cir. 2003) (granting writ where informant's falsified notes that
 3 incriminated defendant were material where no physical or forensic evidence connected
 4 defendant with the crime and defendant's confession contained multiple inconsistencies
 5 and inaccuracies). A petitioner can obtain relief "by showing that the perjured testimony
 6 or false evidence could reasonably be taken to put the whole case in such a different light
 7 as to undermine confidence in the verdict." Kyles, 514 U.S. at 435.³ Alternatively, relief
 8 will be granted where the court cannot say "'with fair assurance . . . that the judgment was
 9 not substantially swayed by the error.'" Killian, 282 F.3d at 1209 (quoting O'Neal v.
 10 McAninch, 513 U.S. 432, 437-38 (1995)) (footnote omitted) (granting relief where witness
 11 perjured himself several times and was the "make-or-break witness" for the state).

12 Here, the Court agrees with the state appellate court's rejection of this claim, as the
 13 link between Deshon's narrative testimony and Petitioner's constitutional rights is tenuous
 14 at best. Petitioner fails even to make the threshold showing that Deshon's narrative
 15 testimony was perjury. There was no indication that the trial court knew whether
 16 Deshon's account of the events was false. Compare Morales v. Woodford, 388 F.3d 1159,
 17 1179 (2004) (holding that presentation of testimony where witness recanted her testimony
 18 "over a decade after the trial" did not render presentation of the testimony error because
 19 because it did not constitute "*knowing* presentation of perjury" during the trial) (emphasis
 20 added), with Hayes, 399 F.3d at 980 (holding that the prosecutor knew whether the
 21 witness had made an agreement with the government concerning disposal of his own
 22 felony cases). Even if the trial court erred in permitting Deshon to testify in
 23 narrative form, Petitioner is not entitled to habeas relief based on this claim. Petitioner has
 24 failed to show how Deshon's narrative testimony influenced the verdict in any significant
 25 way. Moreover, as the state appellate court explained and Petitioner does not contest,

27 ³ Once constitutional error has been found under this test, it subsequently cannot be
 28 found harmless under Brecht v. Abrahamson, 507 U.S. 619 (1993). See Kyles, 514 U.S.
 at 436 & n.9.

1 Petitioner's attorney was allowed to object during Deshon's testimony, to record the
 2 testimony, and then to cross-examine Deshon at length. (Id. at 29.) None of the defense
 3 attorneys requested additional time to listen to the recording before conducting cross-
 4 examination. (Id.) Petitioner's attorney, Tyrell's attorney, and the prosecutor each had a
 5 full opportunity to expose any inconsistencies or falsehoods in Deshon's narrative to the
 6 jury. (Id.) This Court cannot conclude that Deshon's narrative testimony, even if false,
 7 would place the entire case in such a different light as to undermine confidence in the
 8 verdict. Cf. Kyles, 514 U.S. at 435. The state appellate court's rejection of the claim thus
 9 was not contrary to or an unreasonable application of clearly established federal law. See
 10 U.S.C. § 2254(d)(1).

11 2. Right to be present

12 Petitioner also argues that the trial court's decision to allow the *in camera* hearing
 13 to occur outside the presence of Petitioner and his attorney violated Petitioner's right to be
 14 "present at all critical stages of his trial" and to have the assistance of his attorney at all
 15 such stages. (Pet. at 4-5.)

16 The state appellate court concluded that the *in camera* hearing was not a critical
 17 stage of Petitioner's trial, given that the purpose of the hearing was resolve a conflict
 18 between Deshon and his attorney. (Op. at 30.) The court observed that Petitioner's
 19 constitutional rights were unaffected by the hearing, as Deshon's testimony still was
 20 subject to cross-examination. (Op. at 29, 35.)

21 The Supreme Court has recognized that "the right to personal presence at all critical
 22 stages of the trial . . . [is a] fundamental right[] of each criminal defendant." Rushen v.
 23 Spain, 464 U.S. 114, 117 (1983). Due process protects a defendant's right to be present
 24 "at any stage of the criminal proceeding that is critical to its outcome if his presence would
 25 contribute to the fairness of the procedure." Kentucky v. Stincer, 482 U.S. 730, 745
 26 (1987); see, e.g., United States v. Mitchell, 502 F.3d 931, 973 (9th Cir. 2007) (en banc)
 27 (no violation of rights under Due Process Clause or Confrontation Clause where trial judge
 28 met ex parte with United States marshals to discuss security concerns regarding transfer of

1 case to another venue and again before penalty phase after defendant announced his
 2 refusal to be present for that phase of trial); Sturgis v. Goldsmith, 796 F.2d 1103, 1108
 3 (9th Cir. 1986) (finding due process right to be present at competency hearing determining
 4 competency to stand trial). Deprivation of the right to be present at all critical stages and
 5 to be represented by counsel is subject to harmless error analysis. Campbell v. Rice, 408
 6 F.3d 1166, 1172 (9th Cir. 2005) (noting that the Supreme Court has never held that
 7 deprivation of the right to be present is an inherently harmful deprivation that would
 8 require automatic reversal without engaging in harmless error analysis).

9 Here, the state appellate court held correctly that the *in camera* hearing involving
 10 Deshon and his attorney was not a critical stage of Petitioner's trial. The issue at hand was
 11 a conflict between Deshon and his attorney, (Op. at 30), and there is no showing that
 12 Petitioner's presence "would [have] contributed to the fairness of the procedure." Stincer,
 13 482 U.S. at 745. As described above, the hearing did not affect Petitioner's constitutional
 14 rights: his attorney was allowed to object during Deshon's testimony, record the
 15 testimony, and conduct a lengthy cross-examination. (Id. at 29.) Cf. Mitchell, 502 F.3d at
 16 973; Sturgis, 796 F.2d at 1108.

17 Moreover, any error on the part of the trial court was harmless. As described
 18 above, Petitioner has not shown how Deshon's narrative testimony implicated Petitioner's
 19 constitutional rights or influenced the outcome of the trial. Deshon's testimony was brief
 20 and Petitioner's counsel had ample opportunity to discredit it. (Op. at 29-30.) Cf.
 21 Campbell, 408 F.3d at 1172-73 (no error where petitioner could not demonstrate adverse
 22 effects of being excluded from an in-chambers conference). The state appellate court's
 23 conclusion thus was not contrary to or an unreasonable application of clearly established
 24 federal law. See U.S.C. § 2254(d)(1).

25 B. Jury instruction on felony-murder special circumstances

26 Petitioner's second claim is that the trial court's jury instructions with respect to
 27 felony-murder special circumstance violated his rights to due process and to a jury trial on
 28 all elements of the offense. (Pet. at 8.) Specifically, Petitioner argues that the trial court

1 erred in “omitt[ing] the requirement that the act resulting in death was committed to
 2 advance an independent felonious purpose,” (*id.*), in violation of Apprendi v. New Jersey,
 3 which holds that “[o]ther than the fact of a prior conviction, any fact that increases the
 4 penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury,
 5 and proved beyond a reasonable doubt.” 530 U.S. 466, 489 (2000).

6 Special circumstance felony murder is distinct from felony murder as such, which is
 7 defined as “murder... which is committed in the perpetration of, or attempt to perpetrate,
 8 arson, rape, carjacking, robbery, burglary, mayhem, kidnapping.” CAL. PENAL CODE §
 9 189. All felony murders are murders of the first degree, *id.*, and are punishable by a term
 10 of 25 years to life, imprisonment for life without the possibility of parole, or the death
 11 penalty. CAL. PENAL CODE § 190(a). Special circumstance felony murder is murder that
 12 “was committed while the defendant was engaged in, or was an accomplice in, the
 13 commission of, attempted commission of, or the immediate flight after committing, or
 14 attempting to commit [inter alia, robbery].” CAL. PENAL CODE § 190.2(a)(17). Where the
 15 defendant was convicted by a jury, the jury must make a special finding on the truth of the
 16 special circumstance. CAL. PENAL CODE § 190.4(a), (b). A defendant found guilty of
 17 committing felony murder where a special circumstance applies receives imprisonment for
 18 life without the possibility of parole or the death penalty. CAL. PENAL CODE 190.2(a).

19 The trial court gave the following jury instructions with regard to felony murder:

20 Defendants are accused . . . in Count I of having committed
 21 the crime of murder, a violation of Penal Code Section 187. Every
 22 person who unlawfully kills a human being during the commission
 23 or attempted commission of residential burglary and/or robbery is
 24 guilty of the crime of murder in violation of Section 187 of the
 25 Penal Code.

26 A killing is unlawful if it was neither justifiable nor
 27 excusable. In order to prove this crime, each of the following
 28 elements must be proved: One, a human being was killed; two, the
 killing was unlawful; and three, the killing occurred during the
 commission or attempted commission of residential burglary and/or
 robbery.

The unlawful killing of a human being, whether intentional,
 unintentional, or accidental, which occurs during the commission or
 attempted commission of the crime of residential burglary and/or
 robbery is murder of the first degree when the perpetrator had the
 specific intent to commit that crime.

1 The specific intent to commit residential burglary and/or
 2 robbery in the commission or attempted commission of such a crime
 3 must be proved beyond a reasonable doubt.

4 (Reporter's Transcript ("RT") at 2803-04.)

5 The trial court later gave instructions with regard to felony murder special
 6 circumstance, quoted below in relevant part:

7 In order to find a special circumstance alleged in this case to
 8 be true or untrue, you must agree unanimously. You will state your
 9 special finding as to whether this special circumstance is or is not
 10 true on the form that will be supplied., verdict form [sic].

11 To find that special circumstances referred to in these
 12 instructions as murder in the commission of residential burglary
 13 and/or attempted robbery is true, it must be proved that the murder
 14 was committed while the defendant was engaged in the commission
 15 or attempted commission of a residential burglary and/or robbery.

16 (Id. at 2817.)

17 The state appellate court explained that to find the felony murder special
 18 circumstance allegation true, the jury must make a special finding that the defendant killed
 19 "in order to advance [an] independent felonious purpose," (Op. at 39, citing People v.
 20 Berryman, 6 Cal.4th 1048, 1088 (1993), overruled on other grounds by People v. Hill, 17
 21 Cal. 4th (1998) (internal citations omitted)), or that the defendant had "[c]oncurrent intent
 22 to kill and to commit an independent felony," (Op. at 39-40, citing People v. Raley, 2
 23 Cal.4th 870, 903 (1992)). In contrast, where the commission of the independent felony is
 24 incidental to the murder, the defendant is only guilty of felony murder. (Op. at 39, citing
 25 People v. Green, 27 Cal.3d 1, 59-62 (1980) (defendant was not guilty of felony murder
 26 special circumstance where he committed robbery in order to conceal the identity of the
 27 victim after the murder).)

28 The state appellate court held that clarification of the scope of the felony murder
 29 special circumstance is required only where the evidence would warrant a clarification,
 30 and that none of the defendants presented such evidence. (Op. at 40, finding that at trial,
 31 none of the defendants "advanced the theory that Deshon went to Cutrufelli's house on the
 32 night of the shooting for the sole purpose of killing him.") The court concluded that:

33 [T]he overwhelming evidence relevant to the issue of intent was

1 that [Petitioner], Tyrrell and Deshon went to Cutrufelli's house for
 2 the purpose of collecting drugs or money. The only evidence
 3 arguably inconsistent with this conclusion was Deshon's testimony
 4 that the group went to pick up [Petitioner's] pool sticks. There is no
 evidence that Deshon's sole purpose for going to Cutrufelli's house
 was to murder him. Indeed, the evidence was undisputed that
 Deshon had not previously met Cutrufelli.

5 (Op. at 41.)

6 The state appellate court also rejected Petitioner's claim that the attempted robbery
 7 was merely incidental to the murder of Cutrufelli.⁴ (Op. at 41-42.) Petitioner cited
 8 evidence that Deshon made comments indicating that he might physically harm someone,
 9 but the appellate court noted that Deshon denied making these comments, and that
 10 Petitioner's concurrent intent still would establish the special circumstance. (Id.)
 11 Petitioner also contended that Deshon may have had the intent to commit murder because
 12 Deshon "had nothing to gain by robbing Cutrufelli" and that the murder did not advance a
 13 robbery because the defendants did not actually rob Cutrufelli. (Id. at 42.) The state
 14 appellate court pointed out that the record was "silent on these points" and that Deshon's
 15 attorney actually cited the evidence to support the proposition that Deshon lacked a motive
 16 to kill Cutrufelli. (Id.)

17 The state appellate court also held that even if a clarification should have been
 18 given, Petitioner did not "adequately request" an instruction on independent felonious
 19 purpose. (Op. at 37.) Although Petitioner requested jury instructions that referred to
 20 whether the defendants had independent felonious intent when they committed the murder,
 21 neither Petitioner nor the other defendants objected when the trial court deleted those
 22 references. (Id. at 37-38.)

23 Finally, the state appellate court concluded that any trial court instructional error
 24 was harmless because it was not prejudicial. (Id. at 42.) Specifically, the appellate court

25
 26 ⁴ The state appellate court also corrected Petitioner's characterization of a
 27 comment made by the prosecutor in his closing argument. (Op. at 42.) Petitioner argued
 28 that the prosecutor said that he did not have to prove that "the murder was committed to
 advance the attempted robbery." (Id.) The court explained that the prosecutor said only
 that he did not have to establish a motive for killing Cutrufelli. (Id.)

1 found that no evidence supported the claim that Deshon's only purpose in shooting the
 2 victim was to commit murder. (*Id.*) The appellate court also noted that the jury already
 3 had found that Deshon had an independent felonious purpose because it found Deshon and
 4 Petitioner guilty of attempted robbery, and specific intent is an element of attempted
 5 robbery. (*Id.*)

6 Giving a jury instruction that "omits a necessary element of the crime" is a
 7 "constitutional error," because the incomplete instruction relieves the state of its burden of
 8 proving all elements of the crime beyond a reasonable doubt. Ho v. Carey, 332 F.3d 587,
 9 592 (9th Cir. 2003); see, e.g., Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007)
 10 (instruction that eliminated element of deliberation from first degree murder by instructing
 11 jury to find willful, deliberate and premeditated murder if it found premeditation violated
 12 due process); Ho, 332 F.3d at 593 (finding jury instructions "erroneous" rather than
 13 merely ambiguous, where they included an uncorrected erroneous instruction that second-
 14 degree murder could be based on a finding of general intent, but also included an accurate
 15 description of the elements of second-degree murder, including specific intent).

16 However, even if there is a constitutional error, a habeas petitioner is not entitled to
 17 relief unless the instructional error "'had substantial and injurious effect or influence in
 18 determining the jury's verdict.'" Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)
 19 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). In other words, habeas
 20 relief may be granted only if the error resulted in "actual prejudice." *Id.* (citation omitted);
 21 see, e.g., Coleman v. Calderon, 210 F.3d 1047, 1051 (9th Cir. 2000) (finding Brecht error
 22 where "at the very least" the court could not "'say with fair assurance . . . that the
 23 judgment was not substantially swayed by the [instructional] error.'") (internal citations
 24 omitted).

25 This Court concludes that the instructions given did not adequately clarify that a
 26 special circumstance felony murder allegation should not be found true where the felony is
 27 only incidental to the murder. The felony murder instructions required the jury to find that
 28 the murder was committed "during the commission or attempted commission of the

[independent felony].” (RT at 2803-04.) The special circumstance instructions given here conveyed the same meaning: the jury had to find that “the murder was committed while the defendant was engaged in the commission or attempted commission of a residential burglary and/or robbery.” (*Id.* at 2817.) The latter instructions did not clarify that the defendants had to have either concurrent intent to murder and to commit another felony, Raley, 2 Cal. 4th at 903, or that they committed the murder in order to advance an independent felony, Berryman, 6 Cal.4th at 1088.

However, this Court agrees with the California Court of Appeal that any error was harmless. As noted by the state appellate court, “overwhelming evidence” showed that the defendants went to Cutrufelli’s home to rob him, (Op. at 41-42), that none of the defendants argued at trial that the purpose of going to Cutrufelli’s home was to murder him, (*id.* at 40), and that any new arguments raised by Petitioner on appeal are unpersuasive (*id.* at 41-42). Under these circumstances, this Court cannot conclude that the instructional error “had substantial and injurious effect or influence in determining the jury’s verdict,”” Brecht, 507 U.S. at 633, because the jury likely would have reached the same verdict even if the instructions had been clearer. Based on the evidence at trial, the jury could have found that the defendants committed murder in order to advance their attempted robbery, *cf. Berryman*, 6 Cal.4th at 1088, or that the defendants had concurrent intents to commit murder and robbery, *cf. Raley*, 2 Cal. 4th at 903. Accordingly, the state appellate court’s rejection of Petitioner’s claim of instructional error was not contrary to or an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts presented. See U.S.C. § 2254(d).

C. Admission of Petitioner’ statement to police

Petitioner’s third claim is that the trial court’s admission of Petitioner’s post-arrest statement to police and a black bag taken from the crime scene violated Petitioner’s rights against self-incrimination and to due process. (Pet. at 13.) After Petitioner was arrested on June 2, 1998, Detective Vanderpool recorded a conversation between himself and Petitioner around 2:55 a.m. (Op. at 19.) Before beginning the conversation, Vanderpool

1 read Petitioner his Miranda rights, and Petitioner stated that he understood his rights and
 2 signed a waiver form. (Id.) During the conversation, Petitioner asked several times
 3 whether they were being recorded, and Vanderpool assured him that they were not. (Id. at
 4 19-21.) Vanderpool also stated that cooperating would “help” Petitioner, and that
 5 anything Petitioner said would not “hurt” him any more “at this point.” (Id. at 20.) At one
 6 point, Petitioner asked Vanderpool about his black bag, which still was at the crime scene.
 7 (Id.) The bag subsequently was retrieved and used in evidence at trial. (Id. at 22.) Later
 8 in the conversation, Vanderpool told Petitioner that the district attorney’s office would
 9 consider any information provided by Petitioner and “make their . . . decisions”
 10 accordingly. (Id. at 21.) After Petitioner expressed concern about receiving the death
 11 penalty, Vanderpool assured him that he would not because he had no previous strikes.
 12 (Id.)

13 At trial, Petitioner filed two motions – one to preclude the use of his statements to
 14 Vanderpool and a second to suppress the use of the black bag obtained from the crime
 15 scene after Petitioner’s conversation with Vanderpool – on the grounds that his statements
 16 to Vanderpool were involuntary because: 1) he was under the influence of drugs and
 17 alcohol during the conversation; and 2) Vanderpool gave Petitioner “assurances of
 18 leniency and promises that his statement would not be used against him.” (Op. at 22.) In
 19 his federal habeas petition, Petitioner focuses on the fact that Vanderpool gave assurances
 20 that Petitioner’s statements would be “off the record.” (Pet. at 17.)

21 The trial court denied both motions and ultimately found that Petitioner’s
 22 statements were voluntary. (Op. at 23.) First, the trial court found that Petitioner took the
 23 drugs of his own volition, that the evidence did not show that Vanderpool “knowingly
 24 took advantage” of Petitioner’s state, and that Petitioner gave “a rational statement.” (Id.)
 25 Second, as to promises of leniency, the trial court conceded that Vanderpool had told
 26 Petitioner that he would not receive the death penalty, but noted that this statement
 27 appeared on page 68 of the 99-page transcript of the conversation, by which point
 28 Petitioner already had given “most of [his] incriminating statements.” (Id.) The trial court

1 found that apart from the statement about the death penalty, Vanderpool did not make “any
 2 specific promises” to Petitioner, and only “encouraged [Petitioner] to cooperate” while
 3 “ma[king] it clear that the district attorney would make the decision as to leniency.” (Id.)
 4 Finally, although Vanderpool lied to Petitioner about whether his statements were being
 5 recorded, the trial court found that Vanderpool’s assurances were not “reasonably likely to
 6 produce an untrue statement” by Petitioner. (Id.)

7 The state appellate court affirmed the trial court’s conclusions and made its own
 8 findings. (Id. at 25-28.) It found that the evidence showed that Petitioner “wanted to
 9 make a deal and that he was willing to give information about this and other crimes to get
 10 that deal.” (Id. at 25.) Petitioner’s reluctance did not come from speaking to the police as
 11 such but whether others would learn that he had given information to the police about
 12 them. (Id.) Petitioner’s requests that the conversation be “off the record” were not made
 13 because Petitioner feared that the information would be used against *him*, but because he
 14 did not want others to find out that he had spoken with the police. (Id. at 27-28.)

15 To determine the voluntariness of a confession, a court must consider the effect that
 16 “the totality of all the circumstances” had upon the will of the defendant. Schneckloth v.
 17 Bustamonte, 412 U.S. 218, 226-27 (1973). Courts will consider factors such as use of
 18 coercive tactics, including “failure . . . to advise the suspect of his rights,” and “any direct
 19 or implied promises of a benefit,” as well as “the length of the interrogation, its location,
 20 and its continuity.” Clark v. Murphy, 331 F.3d 1062, 1072 (9th Cir. 2003) (internal
 21 citations omitted).

22 A defendant’s voluntary ingestion of drugs or other substances prior to a statement
 23 does not automatically render his statement involuntary. United States v. Heller, 551 F.3d
 24 1108, 1112-13 (9th Cir. 2009) (rejecting defendant’s argument that his ingestion of
 25 Tylenol® with codeine the morning of his confessions rendered his confessions
 26 involuntary: defendant did not tell officers that he had taken medication, defendant
 27 appeared to be alert and able, atmosphere of interview was friendly and cordial, interview
 28 was only 2 hours, and defendant was repeatedly told that he was free to leave; that

1 defendant took medication triggered question of whether he was “unable to exercise free
 2 will due to an impaired mental state” which was also rejected). At the same time, a
 3 promise of leniency from interrogators may render a defendant’s confession involuntary.
 4 Moore v. Czerniak, 574 F.3d 1092, 1103 n.10 (9th Cir. 2009) (holding that district court
 5 did not err in finding that defendant’s confession was involuntary because it was given “in
 6 response to a false promise that the charges against him would be reduced if he confessed
 7 to accidentally killing [the victim]”). However, misrepresentations by interrogators do not
 8 render a defendant’s confession involuntary where the defendant “remain[s] in control of
 9 his responses” and there is no evidence “that his will was overborne” during the
 10 interrogation. Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005).

11 Respondent argues that Petitioner’s claim that he was under the influence of drugs
 12 does not appear in the instant federal petition and has been waived. (Ans. at 16.)
 13 Although Petitioner raises the claim in his traverse, (Trav. at 6-9), Petitioner was required
 14 to “specify *all* the grounds for relief available to [him]” and to “state the facts supporting
 15 each ground” in his initial habeas petition. Rule 2(c), Rules Governing Section 2254
 16 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 (emphasis added).

17 Even if Petitioner had properly raised the claim in his petition, it would not entitle
 18 him to habeas relief. The state trial court’s factual findings supported its legal conclusions
 19 that Vanderpool’s behavior was reasonable and that Petitioner’s statements were
 20 voluntary: Petitioner chose to ingest the drugs himself; he had enough presence of mind to
 21 say that he already knew his Miranda rights and did not need to hear them again; he still
 22 was able to make a rational statement despite having ingested drugs; and the evidence did
 23 not show that Vanderpool knew of Petitioner’s state and took advantage of it by
 24 questioning him anyway. (Op. at 23.) Cf. Heller, 551 F.3d at 1112-13. Petitioner does
 25 not contest any of these findings.

26 Petitioner’s second argument about promises of leniency also is unpersuasive. The
 27 trial court found that none of Vanderpool’s statements could be interpreted as a promise in
 28 exchange for information, except for the statement that Petitioner would not receive the

1 death penalty. (Op. at 23.) However, that assurance came late in the conversation after
 2 Petitioner had already made most of his incriminating statements. (Id.) Cf. Moore, 574
 3 F.3d at 1103 n.10 (promises were coercive where interrogating officers “repeatedly told
 4 [petitioner] that they would ‘go to bat for him’” and “convince[d]” petitioner that
 5 confessing would result in a more lenient sentence for him, as had happened with
 6 petitioner’s brother).

7 Finally, the California Court of Appeal properly rejected Petitioner’s argument that
 8 Vanderpool’s misrepresentations about the conversation being “off the record” rendered
 9 Petitioner’s statements involuntary. Both state courts concluded that Vanderpool lied
 10 about whether their conversation was taped, but neither concluded that Petitioner’s
 11 statements thus were involuntary. (Id. at 23-28.) Petitioner initiated the conversation and
 12 made “rational statement[s].” (Id. at 23, 28.) Cf. Juan H., 408 F.3d at 1273 (although
 13 interrogators gave misrepresentations about consequences of admitting to crimes,
 14 petitioner’s statements were voluntary where he remained in control of his responses and
 15 showed no evidence of having his will overcome).

16 Although Petitioner argues that his statements were involuntary, he has not shown
 17 that the state courts’ assessments of his conversation with Vanderpool were an
 18 “unreasonable determination of the facts in light of the evidence presented in the State
 19 Court proceeding.” 28 U.S.C. § 2254(d). A challenge to the state courts’ findings of fact
 20 “may be based on the claim that the finding is unsupported by sufficient evidence, that the
 21 process employed by the state court is defective, or that no finding was made by the state
 22 court at all.” Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004).⁵ Petitioner’s bare
 23 assertion that his statements were involuntary is insufficient to show that the state courts
 24 made an unreasonable determination of the facts. Cf. Id. at 1005-06 (finding that the state

25
 26 ⁵ Respondent refers to 28 USC section 2254(e)(1), which states that state court
 27 findings of fact are presumed correct unless the petitioner rebuts the presumption with
 28 “clear and convincing evidence.” However, this inquiry does not occur unless the
 petitioner introduces new evidence in federal court. Petitioner has not done so here. See
Taylor, 366 F.3d at 1000.

1 trial court made an unreasonable determination of the facts when it failed to consider the
 2 testimony of a witness who corroborated defendant's version of the facts, where no
 3 witness corroborated the interrogating detective's version).

4 D. Sufficiency of evidence showing that Petitioner acted with reckless disregard
 5 for human life

6 Petitioner claims that there was insufficient evidence to support the jury's finding
 7 that he acted with reckless disregard for human life. (Pet. at 21-23.)

8 The state appellate court found that there was "substantial evidence" to support the
 9 jury's finding. (Op. at 36.) Petitioner gave Deshon drugs, "enlisted" him to "forcibly
 10 collect on a drug debt," "supplied the weapons" used at the murder victim's home,
 11 instigated the conflict with the victim, and left the home after the murder victim was shot.
 12 (Id.)

13 The Due Process Clause "protects the accused against conviction except upon proof
 14 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
 15 charged." In re Winship, 397 U.S. 358, 364 (1970). A state prisoner who demonstrates
 16 that the evidence in support of his or her conviction would not lead a rational trier of fact
 17 to have convicted is thus entitled to habeas relief, see Jackson v. Virginia, 443 U.S. 307,
 18 321 (1979). See, e.g., Wigglesworth v. Oregon, 49 F.3d 578, 582 (9th Cir. 1995) (writ
 19 granted where Oregon procedure of allowing lab reports regarding drug analyses to be
 20 admitted into evidence without authenticating testimony relieved state of its burden to
 21 prove beyond reasonable doubt all elements of crime charged); Martineau v. Angelone, 25
 22 F.3d 734, 739-43 (9th Cir. 1994) (writ granted where evidence found insufficient to prove
 23 elements of child abuse offense).

24 A federal court reviewing a state conviction does not decide whether it would also
 25 have convicted the defendant based on the evidence given. Payne v. Borg, 982 F.2d 335,
 26 338 (9th Cir. 1992), cert. denied, 510 U.S. 843 (1993). Instead, it "determines only
 27 whether, 'after viewing the evidence in the light most favorable to the prosecution, any
 28 rational trier of fact could have found the essential elements of the crime beyond a

1 reasonable doubt.”” See id. (quoting Jackson, 443 U.S. at 319). Only if no rational trier of
 2 fact could have found proof of guilt beyond a reasonable doubt may the writ be granted.
 3 See Jackson, 443 U.S. at 324; Payne, 982 F.2d at 338.

4 This Court concludes that a rational trier of fact could have found that Petitioner
 5 acted with reckless disregard for human life based on the numerous facts identified by the
 6 state appellate court. (Op. at 36.) Cf. Payne, 982 F.2d at 338. Thus, that court’s rejection
 7 of this claim was not contrary to or an unreasonable application of clearly established
 8 federal law. See U.S.C. § 2254(d)(1).

9 E. Admission of 911 tape

10 Finally, Petitioner argues that the trial court erred in admitting the tape of the 911
 11 call made by the victim’s relatives following the victim’s death. He argues that his right to
 12 due process was violated because prejudicial effect of the tape outweighed its probative
 13 value. (Pet. at 24.)

14 The admission of evidence is not subject to federal habeas review unless a specific
 15 constitutional guarantee is violated or the error is of such magnitude that the result is a
 16 denial of the fundamentally fair trial guaranteed by due process. See Henry v. Kernan,
 17 197 F.3d 1021, 1031 (9th Cir. 1999); Colley v. Sumner, 784 F.2d 984, 990 (9th Cir.), cert.
 18 denied, 479 U.S. 839 (1986). The Supreme Court “has not yet made a clear ruling that
 19 admission of irrelevant or overtly prejudicial evidence constitutes a due process violation
 20 sufficient to warrant issuance of the writ.” Holley v. Yarborough, 568 F.3d 1091, 1101
 21 (9th Cir. 2009) (finding that trial court’s admission of irrelevant pornographic materials
 22 was “fundamentally unfair” under Ninth Circuit precedent but not contrary to, or an
 23 unreasonable application of, clearly established federal law under § 2254(d)).

24 Here, the state appellate court found that the 911 tape likely had little value. (Op. at
 25 12.) The descriptions given by the callers of the intruders were, “if useful at all, . . .
 26 redundant of other better evidence,” and were not necessary given that “identity was not a
 27 disputed issue in [the] case.” (Id.) The state appellate court also found that the admission
 28 of the call likely was prejudicial, as the jurors could hear “the voices of the victim’s

1 distraught and traumatized family.” (Id.) Being presented with such evidence may have
 2 prevented the jurors from examining the evidence in an impartial manner. (Id.)

3 Notwithstanding these findings, this Court is bound by Ninth Circuit precedent
 4 holding that there is not clearly established Supreme Court authority forbidding admission
 5 of such evidence. Holley, 568 F.3d at 1101. Thus, it cannot be said that the state courts’
 6 rejection of this claim was contrary to or an unreasonable application of clearly established
 7 federal law. See U.S.C. § 2254(d)(1).

8

9 **CERTIFICATE OF APPEALABILITY**

10 The federal rules governing habeas cases brought by state prisoners have been
 11 amended to require a district court that denies a habeas petition to grant or deny a
 12 certificate of appealability (“COA”) in its ruling. See Rule 11(a), Rules Governing § 2254
 13 Cases, 28 U.S.C. foll. § 2254 (effective December 1, 2009). Petitioner has not shown
 14 “that jurists of reason would find it debatable whether the petition states a valid claim of
 15 the denial of a constitutional right [or] that jurists of reason would find it debatable
 16 whether the district court was correct in its procedural ruling.” Slack v. McDaniel, 529
 17 U.S. 473, 484 (2000). Accordingly, a COA will be denied on those grounds.

18

19 **CONCLUSION**

20 The Court concludes that Petitioner has not shown any violation of his federal
 21 constitutional rights in the underlying state criminal proceedings. Accordingly, the
 22 petition for a writ of habeas corpus is denied. The Clerk shall enter judgment and close
 23 the file.

24 **IT IS SO ORDERED.**

25 DATED: 6/24/10



JEREMY FOGEL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY CRAVER,

Case Number: CV02-04629 JF

Petitioner,

CERTIFICATE OF SERVICE

v.

ERNIE ROE, Warden,

Respondent.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 7/19/10, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Anthony Craver
CSP Lancaster
44750 60th street W.
Lancaster, Ca 93536

Dated: 7/19/10

Richard W. Wieking, Clerk